

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,

Plaintiff,

v.

DEREK A WAITHE,

Defendant.

Case No. 01-cr-40017-JPG

**MEMORANDUM AND ORDER**

This matter comes before the Court on Defendant Derek A. Waithe's *pro se* Motion for Leave to Appeal *in Forma Pauperis* (Doc. 478). Waithe appeals the Court's Order granting his counsel's Motion to Withdraw and "No Merits" Statement and dismissing his *pro se* Motion for Motion for Retroactive Application of Sentencing Guidelines under 18 U.S.C. § 3582(c)(2) and United States Sentencing Guideline Manual ("U.S.S.G.") § 1B1.10 (Doc. 471).

A federal court may permit a party to proceed on appeal without full pre-payment of fees provided the party is indigent and the appeal is taken in good faith. 28 U.S.C. § 1915(a)(3); Fed. R. App. P. 24(a)(3). A frivolous appeal cannot be made in good faith. *Lee v. Clinton*, 209 F.3d 1025, 1026-27 (7th Cir. 2000). The test for determining if an appeal is in good faith or not frivolous is whether any of the legal points are reasonably arguable on their merits. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (citing *Anders v. California*, 386 U.S. 738 (1967)); *Walker v. O'Brien*, 216 F.3d 626, 632 (7th Cir. 2000).

Waithe was sentenced based on relevant conduct that exceeded 4.5 kilograms of crack cocaine. His guideline range was not lowered by a subsequent amendment to the guidelines. In light of the Seventh Circuit's ruling in *United States v. Forman*, 553 F.3d 585, 588 (7th Cir.2009), *cert. denied sub nom McKnight v. United States*, 129 S.Ct. 1924 (Apr. 6, 2009), any argument that this Court has jurisdiction to decide Waithe's Motion is frivolous. Therefore, the

Court **CERTIFIES** that this appeal is not taken in good faith and accordingly **DENIES** the Motion for Leave to Appeal *in Forma Pauperis* (Doc. 478) (Doc. 478).

**IT IS SO ORDERED.**

**Dated: July 22, 2009.**

s/ J. Phil Gilbert

**J. PHIL GILBERT**

**U.S. DISTRICT JUDGE**